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MICHAEL ROBAK, JR., CLERK

IN THE
Supreme Court of the United States
October Term, 1979

No. 79-791

CONSOLIDATED GAS SUPPLY CORPORATION,

Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION
and
PUBLIC SERVICE COMMISSION OF THE
STATE OF NEW YORK,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM OF THE PUBLIC SERVICE
COMMISSION OF THE STATE OF
NEW YORK IN OPPOSITION

PETER H. SCHIFF
General Counsel
Public Service Commission
of the State of New York
Empire State Plaza
Albany, New York 12223

RICHARD A. SOLOMON
Wilner & Scheiner
2021 I. Street, N.W.
Washington, D.C. 20036

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The questions presented by the petition for certiorari are whether the court below acted correctly in finding that (1) the Commission followed proper standards in setting petitioner's rate of return, (2) the Commission's actions were supported by substantial evidence, and (3) that any Commission failure to adhere to its rules was, at best, harmless.

Respondent, the Public Service Commission of the State of New York (New York), relies on the statement of the case in the petition of the Consolidated Gas Supply Corporation (Consolidated), as supplemented by the statement in the memorandum in opposition to be filed by the Federal Energy Regulatory Commission (Commission).

1. It is difficult to conceive of a court of appeals determination less deserving of plenary review than the present one. No substantial question of general applicability is involved. Instead the sole question is whether the court below correctly held that the Commission adequately considered the facts of record and factors alleged to be relevant to the agency determination in fixing the rate of return on equity for Consolidated for a period of twenty-three months from December 1, 1973 to November 1, 1975. Judge Swygert's opinion for a unanimous panel affirming the Commission's decision is, in New York's opinion, eminently correct. In any event, it is exactly the type of judicial review of agency rate determinations which this Court, in *Mobil Oil Company v. FPC*, 317 U.S. 283, 309 (1974), held "is primarily the task of the courts of appeals."

Thus, while the petitioner contends (Pet. 8-9) that the court of appeals opinion "abdicates" the standards for determining rate of return established by *FPC v. Hope Natural Gas Co.*, 320 U.S. 591 (1944), and the earlier *Bluefield Water Works and Improvement Co. v. Public Service Commission*, 262 U.S. 679 (1923), there is no suggestion that the court below affirmed the Commission on any basis deviating from this Court's broad standards in those cases. The claim instead is that the court of appeals

failed to agree with petitioner as to the adequacy of the Commission's consideration of certain factors advanced by petitioner, none of which either the Commission or the court held to be relevant to the Commission's rate of return determination. It is, we submit, obvious that this Court does not sit to reconsider court of appeals review of claims that the Commission ignored certain evidence or gave too much weight to other.

2. Similarly, the court of appeals opinion cannot be characterized as "emasculating the substantial evidence standard" (Pet. 9-13) because it concluded that the fact that the Commission properly "gave greater weight to [Consolidated's capital structure] than Consolidated thought was appropriate" (Pet. App. A-15). As the court below pointed out (*id.*, at Pet. App. A-13-A-14), the Commission opinions considered in detail the criteria Consolidated used in justifying its proposed rates of return, as well as the countervailing evidence of the Commission staff, and were not, as Consolidated asserts (Pet. 10-11), merely "engaged in a superficial effort to mathematically translate the higher returns on equity allowed to two other gas pipeline companies" to the more favorable capital structure enjoyed by Consolidated.

3. Finally (Pet. 13-15), it is suggested, with typical hyperbole, that the court of appeals affirmance of the Commission makes a "mockery" of this Court's decision in *SEC v. Chenery Corp.*, 332 U.S. 194 (1947), because it found a reference in the Commission's order on rehearing to Consolidated's settlement proposal to be harmless error. Again we believe that the court's evaluation of the record in reaching this conclusion was clearly correct. But right or wrong, it involves no principle of law warranting review of

the court of appeals determination. It was, on the contrary, exactly the sort of narrow factual issue upon which the court of appeals review of agency action should be definitive.

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

PETER H. SCHIFF
General Counsel
Public Service Commission
of the State of New York
Empire State Plaza
Albany, New York 12223

RICHARD A. SOLOMON
Wilner & Scheiner
2021 L Street, N.W.
Washington, D.C. 20036

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